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Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS, LLC,

USA CAPITAL DIVERSIFIED TRUST DEED
FUND, LLC,

USA CAPITAL FIRST TRUST DEED FUND,
LLC,

USA SECURITIES, LLC,

Debtors.

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☒ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under
Case No. BK-S-06-10725 LBR

OBJECTION OF USACM TRUST TO ROSS DELLER'S CLAIM FILED IN WRONG DEBTOR'S CASE; OBJECTION OF DTFD TO PROPOSED ALLOWANCE OF CLAIM; AND CERTIFICATE OF SERVICE

Hearing Date: October 15, 2007
Hearing Time: 9:30 a.m.

Ross Deller ("Deller") filed Proof of Claim No. 10725-00053 against USA Commercial Mortgage Company ("USACM") in the amount of \$100,000.00. The USACM Liquidating Trust (the "USACM Trust") hereby objects to Deller's claim. The basis for the claim is shown on the face of the proof of claim and in the attachment as an investment in USA Capital Diversified Trust Deed Fund, LLC ("DTDF"). Accordingly, it is a claim that was incorrectly filed in the USACM case. The USACM Trust respectfully requests that this claim be disallowed as a claim against USACM. Although DTDF has not yet filed a formal proof of claim against USACM, and there is no deadline for it to do so, DTDF has informally asserted a claim in excess of \$100 million and the parties have participated in one unsuccessful mediation on this and other issues. Because DTDF does assert a significant claim against USACM, any claim held by Deller against USACM solely on account of the investment in DTDF is derivative of DTDF's claims against USACM, and Deller may not prosecute such claims on Deller's own behalf.

In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which owned two subsidiaries.¹ The president of Van Dresser looted the subsidiaries, ultimately forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then sued the debtor's principal, and two other defendants (who he alleged aided and abetted the corporate looting) for various torts, including conversion, breach of fiduciary duty, and civil conspiracy.

The court stated that a debtor's trustee has the exclusive right to assert a debtor's claims, and that a claim belongs solely to the debtor's estate if the debtor could have raised the claim at the commencement of the bankruptcy case.² Additionally, if a judgment

¹ *In re Van Dresser Corp.*, 128 F.3d 945 (6th Cir. 1997).

² *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994); see also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with approval in a case involving an LLC debtor).

1 against a defendant by either the debtor or another party asserting the debtor's claim
2 precludes the other from recovery, then the claims are not independent of each other and
3 belong exclusively to the debtor.³

4 Thus, because both the plaintiff and the debtor corporation could state claims for
5 damages against the defendants, but only one could recover on those claims, by default the
6 claims were exclusively property of the Van Dresser trustees.⁴ In order for a plaintiff to
7 bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must
8 be able to allege a distinct and specific injury.⁵

9 Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset
10 purchase agreement that specifically included the assumption of debt owed to the debtor's
11 managing member. The agreement fell through, and after the managing member filed an
12 involuntary petition for relief against the debtor, the managing member asserted various
13 causes of action against the purchasing company, including contract claims, debt
14 assumption claims, misrepresentation claims, and interference claims.⁶ The court,
15 however, found that all of the claims involved both the debtor's managing member and the
16 debtor itself, and thus the right to pursue all of the causes of action resided with the
17 trustee.⁷

18 DTDF further objects to any allowance of Deller's claim as a claim against the
19 DTDF estate. DTDF has determined that Deller has three allowed proofs of interest in the

20 ³ *Id.*

21 ⁴ *Id.* at 948.

22 ⁵ *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the suits on
the guaranty).

23 ⁶ *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

24 ⁷ See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine whether
25 action is individual or derivative based on state law, and the preferred shareholders breach of
fiduciary duty claims were derivative per Delaware law); *In re Van Dresser*, 128 F.3d at 947
26 ("whether a creditor has sole right to a cause of action is determined in accordance with state
law").

DTDF case: \$96,094.65 in account no. 3438, \$48,047.32 in account no. 5353, and \$48,047.32 in account no. 6353. The Deller claim is seemingly a duplicate of claim no. 10725-00041, which is the subject of an objection filed by the USACM Trust and DTDF concurrently herewith. This objection does not seek to prejudice the rights of Deller as a DTDF member to recover from the DTDF estate on a pro rata basis on account of Deller's membership interests in the amounts noted above. Deller shall retain an interest in DTDF in the amounts of \$96,094.65 in account no. 3438, \$48,047.32 in account no. 5353, and \$48,047.32 in account no. 6353, as reflected in the books and records of DTDF, and Deller is entitled to receive distributions on a pro rata basis with all other DTDF members.

Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow Deller's claim against USACM and disallow any proposed allowance of Deller's claim in the DTDF case.

This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

Dated: September 14, 2007.

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1 *Capital Diversified Trust Deed Fund, LLC*

2 **CERTIFICATE OF SERVICE**

3 I certify that a copy of the foregoing was served via first class mail, postage prepaid,
4 addressed as set forth below, on this 14th day of September, 2007 to:

5 Ross Deller
6 1469 Harmony Hill
7 Henderson, NV 89014

8 By /s/ Patricia M. Kois
9 Patricia M. Kois, Lewis and Roca LLP
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